

THE LIMITS OF PRESIDENTIAL REMOVAL POWER

I. INTRODUCTION

On April 30, 1973, Richard Kleindienst resigned as Attorney General, citing his close personal relationships with individuals who had become suspects in the Watergate investigation.¹ The same day, President Nixon announced the nomination of Defense Secretary Elliot Richardson to succeed Kleindienst as Attorney General.²

Also on the same day, the Democratic governors, meeting in Huron, Ohio, called for the appointment of an independent special prosecutor to direct the Watergate investigation,³ and in Washington, Robert Mervise, then president of the American Bar Association, echoed their call.⁴ On May 1, the Senate adopted a resolution calling for the appointment of such a special prosecutor.⁵

On May 2, Senator John Tunney, a member of the Judiciary Committee, said he would attempt to block committee approval of Richardson's nomination to be Attorney General, unless Richardson agreed in advance to name a special Watergate prosecutor.⁶ While unwilling to go as far as Tunney, other senators on the Judiciary Committee expressed the belief that Richardson would name a special prosecutor before his nomination came before the Committee.⁷

Under heavy pressure, on May 18 Richardson announced that, if confirmed, he would name former Solicitor General Archibald Cox to be the Watergate Special Prosecutor.⁸ Later, during the Senate Judiciary Committee hearings on his nomination, Richardson presented to the Committee a series of detailed guidelines which would govern the Office of the Special Prosecutor.⁹ The guidelines were subsequently promulgated as administrative regulations of the Department of Justice.¹⁰ The guidelines provided:

¹ N.Y. Times, May 1, 1973, at 1, col. 7.

² *Id.*

³ N.Y. Times, May 1, 1973, at 32, col. 8.

⁴ *Id.*

⁵ N.Y. Times, May 2, 1973, at 1, col. 6.

⁶ N.Y. Times, May 3, 1973, at 1, col. 6.

⁷ *Id.*

⁸ Washington Post, May 19, 1973, at 1, col. 1.

⁹ *Hearings before the Senate Committee on the Judiciary on the nomination of Elliot Richardson*, 93d Congress, 1st Sess., at 144-146 (1973).

¹⁰ 38 Fed. Reg. 14688 (1973).

(1) "The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions."¹¹

(2) The Special Prosecutor would have "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice."¹²

(3) The Special Prosecutor would be given "full authority" to determine "whether or not to contest the assertion of 'Executive Privilege' or any other testimonial privilege."¹³

(4) "The Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part."¹⁴

However, when asked by Senator Tunney if he could define the term "extraordinary improprieties," Richardson replied: "No, I don't think I could, really."¹⁵ He added, "I can't conceive, as a matter of fact, of Professor Cox . . . being guilty under any circumstances of extraordinary improprieties."¹⁶ On May 23, Richardson's nomination was confirmed by the Senate.¹⁷

Then on July 16, 1973, in surprise testimony before the Senate Watergate Committee, former White House aide Alexander Butterfield revealed that the President had electronic listening devices in his office which would have recorded presidential conversations with John Dean and other key figures in the Watergate investigation.¹⁸ Butterfield's statement was confirmed by the White House the same day,¹⁹ but the President later refused a request to surrender specified tape recordings of Watergate-related conversations to the Special Prosecutor, who then moved to subpoena them.²⁰ When the subpoena was ignored, Cox petitioned the district court for an order—directed to the President—to show cause why the tapes should not be produced. White House attorneys countered that the tapes were protected by the doctrine of executive privilege.

¹¹ 28 C.F.R. § 0.37 (1973).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Hearings before the Senate Committee on the Judiciary on the nomination of Elliot Richardson*, 93d Congress, 1st Sess., at 177 (1973).

¹⁶ *Id.*

¹⁷ *N.Y. Times*, May 24, 1973, at 1, col. 6.

¹⁸ *N.Y. Times*, July 17, 1973, at 1, col. 8.

¹⁹ *Id.*

²⁰ *N.Y. Times*, July 24, 1973, at 1, col. 8.

In ruling on the matter,²¹ Chief Judge John J. Sirica conceded that "there can be executive privileges that will bar the production of evidence,"²² but held that the scope of the privilege was to be determined by the courts, rather than by the Executive as a matter of his discretion. Judge Sirica ordered production of the tapes for *in camera* screening to determine which parts, if any, of the tapes should be forwarded to the grand jury.

Both sides appealed. On October 12, 1973, Judge Sirica's order was affirmed by the court of appeals, sitting en banc.²³ This time, the President declined to appeal. He also refused to comply with the court's order, and, instead, proposed to release summaries of the tapes, authenticated by Mississippi Senator John Stennis, who would hear the actual tapes in their entirety.²⁴ Nixon also ordered the Special Prosecutor to stop seeking presidential tapes and documents through the judicial process.²⁵

In a televised press conference, Cox announced that he would not comply with the President's order.²⁶ Nixon then ordered Attorney General Richardson to fire Cox. Richardson refused, and resigned, citing the promises he had made at his confirmation hearings.²⁷ The President then directed Deputy Attorney General William French Smith to fire Cox.²⁸ He also refused, and was himself fired.²⁹ Then, Nixon appointed Solicitor General Robert Bork as acting Attorney General, and directed him to discharge the Special Prosecutor. Bork obeyed.³⁰

This note examines the legality of the dismissal of the Special Prosecutor, and its probable consequences for the Justice Department and the Nation.

II. THE HISTORICAL DEVELOPMENT OF THE REMOVAL POWER

The extent of the President's power to remove other governmental officials from office has been called "an unsettled problem of American

²¹ *In re* Subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973), *aff'd sub. nom.* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

²² 360 F. Supp. at 5.

²³ Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

²⁴ TIME, October 29, 1973, at 12.

²⁵ *Id.* at 19.

²⁶ *Id.* at 25.

²⁷ *Id.*

²⁸ *Id.* at 12.

²⁹ *Id.*

³⁰ *Id.*

constitutional law."³¹ Article II, § 1 of the Constitution provides that the "executive Power shall be vested" in the President, and article II, § 2 grants the President certain powers of appointment. But the Constitution nowhere explicitly grants the President the power to remove those whom he appoints.

The President's removal power was not discussed at the Constitutional Convention.³² One historian has written that a "fear of political power . . . pervaded Revolutionary thinking"³³ and that the American people "were in no mood to give a faraway, central regime in the United States what they were busy denying to a faraway, central regime in Britain"³⁴ These factors may at least partially explain the reluctance of the framers explicitly to grant the President the power of removal. In one early case, a state court judge even expressed the belief that the Constitution would not have been ratified had it vested unlimited removal power in the President.³⁵

Writing in *The Federalist*, Alexander Hamilton argued that Senate approval was required to "displace as well as appoint,"³⁶ a requirement Hamilton believed would help bring about a "steady administration."³⁷ Regardless of the merits of Hamilton's view, it was not incorporated into the Constitution, and was never generally adopted. Instead, after considerable debate,³⁸ the members of the first Congress, in establishing the Department of Foreign Affairs, provided by clear implication that the head of the department could be removed by the President.³⁹ Similar provisions were made in the acts establishing the Departments of War⁴⁰ and Treasury.⁴¹

One of the earliest judicial statements on the removal power occurred in the landmark case of *Marbury v. Madison*.⁴² Marbury had been ap-

³¹ Note, *Constitutional Law—Removal Power of the President*, 13 VA. L. REV. 122 (1926).

³² See generally M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1966).

³³ C. ROSSITER, 1787: THE GRAND CONVENTION 47 (1966).

³⁴ *Id.*

³⁵ *Fields v. People*, 3 Ill. (2 Scamm.) 79, 165-166 (1839).

³⁶ THE FEDERALIST NO. 77, at 459 (Mentor ed. 1961) (Hamilton).

³⁷ Hamilton's suggestion must be viewed in light of his apparently intense desire for stability in government. The same concern led him to advocate a long term for the President, fearing the disquieting effect of half a dozen former chief executives "wandering among the people like discontented ghosts and sighing for a place which they were destined never more to possess" *Id.* NO. 72, at 438.

³⁸ 1 ANNALS OF CONGRESS 383-399, 473-608 (1789).

³⁹ 1 Stat. 29 (1789). The precise language was "whenever the said principal officer shall be removed from office by the President of the United States."

⁴⁰ 1 Stat. 50 (1789).

⁴¹ 1 Stat. 65 (1789).

⁴² 5 U.S. (1 Cranch) 137 (1803).

pointed a Justice of the Peace for the District of Columbia in the waning hours of the administration of President John Adams, but lack of time prevented the delivery of his commission. The incoming Jefferson administration was understandably resentful of Marbury and the other "midnight judges," and Jefferson's Secretary of State, James Madison, refused to deliver Marbury's commission.

Marbury then sought mandamus in the Supreme Court. In his famous decision, Chief Justice Marshall remarked:

As the law creating the office gave the officer a right to hold it for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights which, are protected by the laws of his country.⁴³

The Court declined to issue mandamus, however, holding that the act of Congress which purportedly granted the Court original jurisdiction to issue mandamus was in conflict with article III of the Constitution, and was therefore invalid.

It is possible, of course, that Marshall's assertion that the President lacked the power to remove Marbury after appointment was only dictum, since the Court's holding—that it lacked original jurisdiction in mandamus—was clearly not dependent on the removal power. On the other hand, had the President possessed the power to remove Marbury from his office, it would have been unnecessary to consider whether or not to issue mandamus. It is highly unlikely, even though subject matter jurisdiction is logically determined at the outset of a case, that Marshall would have reached the vital constitutional issue decided, had it been possible to dispose of the case easily on other grounds.

Marbury is distinguishable from most cases involving presidential removal, since it involved a judicial, and not an executive officer.⁴⁴ Even if the case could not be distinguished, Marshall's statement on the removal power has not been followed in subsequent decisions of the Court.

The Supreme Court discussed the removal power again in *Ex Parte Hennen*,⁴⁵ a case often cited for much more than it held. The decision involved Duncan Hennen, the clerk of the United States District Court for the Eastern District of Louisiana. Hennen had been appointed to his

⁴³ *Id.* at 162.

⁴⁴ The fact that Congress limited the term of office to five years, however, implies that the office, even though judicial in nature, was created pursuant to article I of the Constitution, and not article III. Article III judges hold office during good behavior, and not for a specified term of years. See generally C. WRIGHT, *FEDERAL COURTS* § 11, at 29 (2d ed. 1970).

⁴⁵ 38 U.S. (13 Pet.) 230 (1839).

position pursuant to an act of Congress granting both the Supreme Court and the district courts the power to appoint clerks for their respective courts. In May of 1838, Hennen was dismissed by a district judge, who also appointed Hennen's successor. Hennen then sought a writ of mandamus compelling his reinstatement.

In reviewing the case, the Supreme Court stated: "[I]t was very early adopted, as the practical construction of the Constitution, that this power [of the President to remove officers appointed with the concurrence of the Senate] was vested in the President alone."⁴⁶ The Court held, however, that the power to appoint clerks for a district court was vested exclusively in that court, and that the Supreme Court therefore had no control over the removal.⁴⁷ Mandamus was denied. The Court's statement concerning the President's power of removal was clearly dictum, since it in no way affected the precise issue decided; no presidential removal was involved in the case.

In *United States v. Perkins*,⁴⁸ the Court considered the case of a naval cadet-engineer who had been discharged by the Secretary of the Navy, simply because his services were "not required." A statute of Congress provided that no officer could be dismissed from the armed services except upon court-martial. Following his dismissal, the cadet sued in the Court of Claims to recover lost wages. Article II, § 2 of the Constitution provides that Congress may by law vest the appointment of inferior officers in the President, the courts, or in the heads of Departments. In holding the cadet's dismissal invalid, the Court stated: "We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest."⁴⁹ *Perkins* established the precedent, still binding today,⁵⁰ that where Congress vests the power of appointment in some official other than the President, it may restrict and regulate the manner in which the appointee may be removed.

The Court considered the President's power of removal in *Parsons v. United States*.⁵¹ Lewis Parsons, a U.S. Attorney appointed for a term of four years, had been dismissed by President Cleveland before the expiration of his term. After examining a number of statutes, including the statute under which Parsons was appointed, the Tenure of Office

⁴⁶ *Id.* at 259.

⁴⁷ *Id.* at 261.

⁴⁸ 116 U.S. 483 (1886).

⁴⁹ *Id.* at 485.

⁵⁰ See *White v. Gates*, 253 F.2d 868, 869 (D.C. Cir., 1958); *Carter v. Forrestal*, 175 F.2d 364, 366 (D.C. Cir., 1949).

⁵¹ 167 U.S. 324 (1897).

Act,⁵² and its modifications, the Court concluded that Congress had not intended the four-year term to operate as a minimum, nor had Congress intended to deny the President the power to remove U.S. Attorneys before the expiration of their terms. Parsons dismissal was upheld, but the Court avoided deciding whether or not the President had a constitutional power of removal, since the decision was based entirely on statutory construction.

A similar result was reached in *Shurtleff v. United States*.⁵³ Shurtleff had been a general customs appraiser, who was removed by President McKinley. The statute under which Shurtleff was appointed⁵⁴ provided that appraisers "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office."⁵⁵ The Court first stated that had the petitioner been discharged for one of the reasons enumerated in the statute, he would have been entitled to notice and a hearing. Since neither was afforded, the Court concluded that the dismissal was for some cause not specified in the statute. In upholding the President's right to remove for other causes, the Court held that the right of removal was inherent in the power of appointment, and that it existed unless taken away by "plain and unambiguous language."⁵⁶ The mere enumeration of certain causes for which removal might be made was held insufficient to restrict the President's power to remove for other causes. Again, the Court avoided deciding whether Congress could constitutionally restrict the President's power to remove officers appointed by him.

That question was finally reached in 1926, in the landmark case of *Myers v. United States*.⁵⁷ Myers was a postmaster at Portland, Oregon. An act of Congress⁵⁸ provided that:

[P]ostmasters of the first, second, and third class may be removed by the president *with the advice and consent of the Senate*, and shall hold their offices for four years unless sooner removed according to law. . . .⁵⁹

Myers was removed by President Wilson without any attempt to secure the advice and consent of the Senate. Myers sued in the Court of Claims to recover his lost pay; however, the Court of Claims ruled against him because he had waited too long to sue.

⁵² 14 Stat. 430 (1867).

⁵³ 189 U.S. 311 (1903).

⁵⁴ 26 Stat. 131 (1890).

⁵⁵ *Id.* at 136.

⁵⁶ 189 U.S. at 318.

⁵⁷ 272 U.S. 52 (1926).

⁵⁸ 19 Stat. 80 (1876).

⁵⁹ *Id.* (emphasis added).

The Supreme Court affirmed on different grounds. In an opinion by Chief Justice Taft, the Court held that the "power of removal is incident to the power of appointment,"⁶⁰ and that the statute in question (the Tenure of Office Act), insofar as it restricted the power of the President to remove officers appointed by him, was unconstitutional.⁶¹

In reaching that conclusion, the Court exhaustively reviewed the historical development of the removal power. The Court contrasted the general grant of executive power contained in article II of the Constitution with the specific grants of enumerated legislative powers contained in article I. The Court viewed the fact that no express limitation was placed on the power of removal as a "convincing indication that none was intended."⁶²

The decision seems grounded, however, in the mandate of article II that the President "shall take care that the laws be faithfully executed," and in the realization that the President might be seriously impeded in his exercise of that duty if he were unable to remove officials who were disloyal, incompetent, or merely uncooperative. The Court specifically stated that the President needs "the disciplinary influence . . . of a reserve power of removal"⁶³ in order to enforce the laws. The Court added:

The moment that [the President] loses confidence in the intelligence, ability, judgment, or loyalty of any [cabinet officer] he must have the power to remove him without delay. . . . The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to *all appointed by him*.⁶⁴

Three justices dissented in *Myers*. Justice McReynolds argued that only clear language should give the President such unlimited power of removal, and noted that no such language was found in the Constitution. Justice Holmes argued that where Congress had created a position, and had the power to transfer the power of appointment to an official other than the President, Congress clearly had the power to restrict the manner in which the appointee could be removed. Justice Brandeis noted that Senate concurrence in the removal of officials had been a legislative prac-

⁶⁰ 272 U.S. at 122.

⁶¹ The *Myers* case presented the rare situation in which the Solicitor General of the United States attacked the constitutionality of an act of Congress. As a result, the Court permitted Senator George Wharton Pepper of Pennsylvania to participate as *amicus curiae*, urging that the statute involved was not an unconstitutional infringement on the President's power of removal.

⁶² 272 U.S. at 128.

⁶³ *Id.* at 132.

⁶⁴ *Id.* at 134 (emphasis added).

tice for nearly half a century, and that absent a judicial decision to the contrary, such a practice should be tantamount to judicial construction.

Perhaps the opinion of the Chief Justice was influenced by his own years as president. Read narrowly, the decision held that the President could remove a postmaster, appointed by him, notwithstanding congressional legislation to the contrary. Read broadly, it held that the President had the unrestricted power, under the Constitution, to remove any official appointed by him, except for federal judges. Further, the Chief Justice even suggested that the President could remove quasi-judicial officers, such as members of the independent regulatory agencies.⁶⁵ This suggestion led one commentator to criticize the decision as a "menacing challenge to an administrative organization which represents years of planning and experimentation in meeting modern conditions."⁶⁶

The Court dealt with this criticism nine years later, in *Humphrey's Executor v. United States*.⁶⁷ In doing so, it greatly limited the reach of the *Myers* decision. Humphrey had been a member of the Federal Trade Commission, and under the Federal Trade Commission Act any commissioner could be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."⁶⁸ Humphrey was removed from his position by President Roosevelt, who, undoubtedly relying on the *Myers* decision, candidly admitted that the removal was for policy reasons, and not one of the causes specified in the statute. Humphrey's executor brought suit to recover his lost wages.

The Court first considered the nature and function of the Federal Trade Commission, and concluded that "its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."⁶⁹ The Court noted that the *Myers* decision clearly covered all purely executive officers, but that it went no further, and did not include an officer "who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President."⁷⁰ The decision clearly recognized that the independence of the regulatory agencies would be threatened, if not destroyed, if the President could remove members at will. The Court held that the Constitution does not grant the President the unlimited power of removal with respect to of-

⁶⁵ *Id.* at 135.

⁶⁶ E. CORWIN, *THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION* 68 (1927).

⁶⁷ 295 U.S. 602 (1935).

⁶⁸ *Id.* at 622.

⁶⁹ *Id.* at 627-628.

⁷⁰ *Id.* at 629.

icers whose positions are quasi-legislative or quasi-judicial, even where such officers were appointed by the President.⁷¹

The Supreme Court carried the doctrine of *Humphrey's Executor* one step further in *Wiener v. United States*.⁷² Wiener had been a member of the War Claims Board, established by Congress to receive and adjudicate claims for compensation for personal injury and property damage suffered at the hands of the enemy during the Second World War. Congress had made no provision for the removal of a commissioner in the statute. Wiener was removed by President Eisenhower, apparently for policy reasons, and brought suit in the Court of Claims for lost salary.

In reviewing the case, the Supreme Court concluded that the War Claims Board was an adjudicatory body, with "all the paraphernalia by which legal claims are put to the test of proof."⁷³ The Court noted that, by statute, the determinations of the Board were not subject to review by any other official or court, by mandamus or otherwise. Since individual claims could not be reviewed by the President, the Court decided that Congress did not intend for the President to influence the Board by replacing its members, and that under the rule of *Humphrey's Executor*, Wiener's dismissal was invalid, even in the absence of an express congressional restriction on the President's power of removal.

While the rules enunciated in *Humphrey's Executor* and *Wiener* have limited the President's power to remove quasi-judicial and quasi-legislative officers,⁷⁴ the President still retains the unlimited power to remove purely "executive officers."⁷⁵ However, as the *Perkins* case indicates different rules apply to governmental officers appointed by officials other than the President. Subject to certain exceptions, the federal government has the power to discharge its employees summarily.⁷⁶ One exception occurs when Congress, as in *Perkins*, has restricted or regulated the power of removal. Another exception occurs when an executive department promulgates administrative regulations—having the force and effect of law—establishing procedures governing the dismissal of employees.

It is well settled that an administrative regulation having the force and effect of law is binding on the official who prescribed it, so long as

⁷¹ *Id.*

⁷² 357 U.S. 349 (1958).

⁷³ *Id.* at 354.

⁷⁴ In *Humphrey's Executor*, the Court did not provide a concrete test for determining whether a position is quasi-legislative or quasi-judicial, or purely executive. The distinction between the two is still somewhat less than clear.

⁷⁵ *Martin v. Tobin*, 451 F.2d 1335, (9th Cir. 1971).

⁷⁶ See *Heaphy v. Bureau of Customs*, 354 F. Supp. 396 (S.D.N.Y. 1973).

the regulation remains operative.⁷⁷ The Supreme Court has twice ruled that an executive department may not discharge an employee in a manner inconsistent with its own administrative regulations governing their discharge. The first case was *Service v. Dulles*.⁷⁸ John Service, a foreign service officer of the State Department, was fired by Secretary of State Dean Acheson following the conclusion by the Loyalty Review Board that there was reasonable doubt as to Service's loyalty. The second case was *Vitarelli v. Seaton*.⁷⁹ Vitarelli, an educator employed by the Interior Department, was fired because, among other things, he had been in "sympathetic association" with alleged Communists, and because he had allegedly concealed those associations from the government.

The Court found that neither discharge was accomplished according to procedures mandated by existing administrative regulations, and both were therefore illegal and of no effect. The Court's position was well summarized by its statement in *Vitarelli*:

Having chosen to proceed against petitioner on security grounds, the Secretary here, as in *Service*, was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily.⁸⁰

Dismissal from federal employment, however, is generally a matter of agency discretion, and judicial review of those matters is limited to determining whether there was compliance with the required procedural steps.⁸¹ A court may not substitute its own judgment for that of the governmental agency.⁸²

In summary, four principles emerge from the cases on the removal power:

- (1) The President has the unlimited power to remove purely executive officers appointed by him, and Congress cannot constitutionally restrict that power, even where Congress created the position in question.

- (2) Where Congress has vested the appointment to a particular office in some official other than the President, it may limit and regulate the manner in which the appointee may be removed.

⁷⁷ That doctrine had its origin in United States *ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

⁷⁸ 354 U.S. 363 (1957).

⁷⁹ 359 U.S. 535 (1959).

⁸⁰ *Id.* at 539-40.

⁸¹ See *Brown v. Zuckert*, 349 F.2d 461, 463 (7th Cir. 1965); *West v. Macy*, 284 F. Supp. 105, 106 (S.D. Miss. 1968).

⁸² See *Coledanchise v. Macy*, 265 F. Supp. 154, 158 (D.S.C. 1967)

(3) The President may remove quasi-legislative and quasi-judicial officers only for cause, even where the President appointed the officer, and even if Congress has enacted no express limitation concerning removal.

(4) An executive department may not discharge employees in a manner inconsistent with its own administrative regulations, having the force and effect of law, governing their dismissal.

III. THE DECISION IN *NADER V. BORK*

After the dismissal of the Special Prosecutor, public interest advocate Ralph Nader and three members of Congress⁸³ filed suit in the United States District Court for the District of Columbia against Robert Bork, the acting Attorney General, seeking a declaratory judgment that the dismissal was in fact illegal.⁸⁴ In addition, the plaintiffs sought injunctions reinstating Archibald Cox to his former position and halting the Watergate investigation until he had reassumed control. In a cogent, well-reasoned opinion, District Judge Gerhard Gesell held that the dismissal was in "clear violation of an existing Justice Department regulation . . . and was therefore illegal."⁸⁵

The court began its decision by discussing the plaintiffs' standing to litigate. Ralph Nader was summarily dismissed as a plaintiff on the authority of *Flast v. Cohen*,⁸⁶ because it was "abundantly clear that he had no legal right to pursue these claims."⁸⁷ Although defendant Bork also challenged the standing of the congressional plaintiffs, these contentions were rejected. Citing the large number of Watergate-related bills pending in Congress, and the related possibility of the President's impeachment, the court upheld the standing of the congressional plaintiffs because of the effect that a declaratory judgment concerning the legality of Cox's dismissal would have on the plaintiffs' duties as members of Congress. The court's discussion of the standing issue is somewhat less than persuasive,⁸⁸ but it is not directly relevant to the merits of the case and is therefore beyond the scope of this note.

⁸³ Senator Frank Moss (D-Utah), and Representatives Bella Abzug (D-New York), and Jerome Waldie (D-California).

⁸⁴ *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

⁸⁵ *Id.* at 108.

⁸⁶ 392 U.S. 83 (1968).

⁸⁷ 366 F. Supp. at 106, n.1.

⁸⁸ Under the rule of *Flast v. Cohen*, 392 U.S. 83, 102 (1968), the Constitution requires the plaintiff to have a requisite stake in the outcome of a case or controversy so as to insure that the dispute sought to be adjudicated will be presented in an adversary context, and in the form historically viewed as capable of judicial resolution.

Furthermore, although not constitutionally required, the Supreme Court has routinely

The court also concluded, over the contentions of Mr. Bork, that the controversy had not become moot, even though a new Special Prosecutor had been appointed, and former Special Prosecutor Cox had expressed no interest in reinstatement. Noting that the preceding events had "engendered considerable public distrust of government,"⁸⁹ the court remarked: "There is a pressing need to declare a rule of law that will give guidance for future conduct with regard to the Watergate inquiry."⁹⁰ Noting the possibility that the defendant's conduct might be repeated with regard to the new Special Prosecutor, as well as the substantial possibility that pending legislation might be affected by the outcome of the suit, the court concluded that the "situation not only saves the case from mootness . . . but forces decision."⁹¹

refused to allow one litigant to raise the rights of a third party, except where exceptional circumstances make it impossible for the injured party to raise his own rights. C. WRIGHT, *FEDERAL COURTS* § 14, at 43 (2d ed. 1970).

In *Nader v. Bork*, it would appear that the plaintiffs were essentially raising the rights of the discharged Special Prosecutor, who declined to join the suit. It appears that they had no personal stake in the outcome of the case, other than the fact that the result may have affected their duties as members of Congress. Although the Court of Appeals for the District of Columbia upheld a similar claim of standing in *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973), the duties of the members of Congress may well be affected by countless pieces of litigation pending in courts across the country, and to hold that they have standing to intervene in such suits, or to bring such suits themselves, merely because the suits may affect pending legislation, is a novel proposition indeed.

A much stronger case for such standing (not cited in *Nader v. Bork*) is *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C. 1973), where the court permitted members of the Senate to bring an action to remove the acting director of the Office of Economic Opportunity, on the ground that he had not been confirmed by the Senate, as required by statute. There, the members of the Senate had been denied their right to confirm or reject the acting director. Unlike the OEO Director, the Special Prosecutor was not subject to Senate confirmation.

⁸⁹ 366 F. Supp. at 106.

⁹⁰ *Id.*

⁹¹ *Id.* at 106-07. The judicial power of the United States clearly does not include the power to decide moot questions. 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 21, at 88 (Wright ed. 1960). Had the real controversy in *Nader v. Bork* been between the Acting Attorney General and Archibald Cox, who had not sought reinstatement, and had reassumed his duties at Harvard, it would be difficult to argue that the case was not moot.

However, accepting *arguendo* the court's determination that the congressional plaintiffs had standing to maintain the action, the court's conclusion that the case was not moot becomes more tenable. Professor Moore has written that "performance of the particular act sought to be enjoined may moot the injunction issue, but where there is a likelihood that the act complained of will be repeated . . . a declaratory judgment may be rendered to define the rights and obligations of the parties. 6A J. MOORE, *FEDERAL PRACTICE* § 57.13, at 57-133 (1974).

In *United States v. Concentrated Phosphate Export Ass'n., Inc.* 393 U.S. 199, 203 (1968), an antitrust suit for injunctive relief, the Court refused to hold that the controversy was moot, but stated that it "might become moot if subsequent events made it absolutely clear . . . that the allegedly wrongful behavior could not reasonably be expected to recur."

In *Nader v. Bork*, it was certainly not clear that the wrongful behavior—the dismissal of a Special Prosecutor without compliance with procedures required by existing administrative regulations—could not reasonably be expected to recur.

The court, however, denied all injunctive relief. In doing so, it relied on rule 19(a) of the Federal Rules of Civil Procedure, apparently concluding that the ousted Special Prosecutor Cox was an indispensable party.

Turning to the merits, the court first noted, significantly, that the Special Prosecutor was appointed by the Attorney General and not the President, thus removing the Special Prosecutor from the ambit of the *Myers* decision. The court also noted that the Attorney General derived his authority to appoint a Special Prosecutor from acts of Congress,⁹² and therefore, under the *Perkins* rule,⁹³ Congress could limit the manner in which the Special Prosecutor could be removed. Since Congress had delegated that power to the Attorney General⁹⁴ and former Attorney General Richardson had chosen to limit his power of removal by prescribing administrative regulations, which provided that the Special Prosecutor could be removed only for extraordinary improprieties,⁹⁵ the Attorney General and his successors were bound by those regulations. Although defendant Bork might have plausibly argued that Cox's refusal to obey a direct presidential order constituted an extraordinary impropriety *per se*, Bork freely admitted, and the court found, that there had been no extraordinary impropriety.⁹⁶

Under the rules laid down by the Supreme Court in *Service* and *Vitarello*, then, the court had little choice but to conclude, as it did, that the dismissal was illegal.

The only question remaining was whether the subsequent rescission⁹⁷ of the removal regulations effectively discharged Cox at the time of re-

⁹² 28 U.S.C. § 509 (1970) provides:

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except for the functions—

(1) vested by subchapter 11 of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.;

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

(4) of the Board of Parole.

²⁸ U.S.C. § 510 (1970) provides:

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

⁹³ *United States v. Perkins*, 116 U.S. 483 (1886).

⁹⁴ 5 U.S.C. § 301 (1970) provides in part: "The Head of an Executive Department or military Department may prescribe regulations for the government of his department"

⁹⁵ 28 C.F.R. § 0.37 (1973).

⁹⁶ 366 F. Supp. at 107 (D.D.C. 1973).

⁹⁷ 38 Fed. Reg. 29466 (1973).

scission. The court quickly concluded that it had not. The court noted that an agency's power to revoke its own regulations is not absolute—the action must be “neither arbitrary nor unreasonable”⁹⁸ and that virtually the same regulations were reinstated only three weeks after the rescission. The court concluded that the rescission was merely a “ruse” to discharge Special Prosecutor Cox, and that it was therefore both arbitrary and unreasonable.

The court's conclusion that the Special Prosecutor's dismissal was illegal is persuasive and well supported by the court's citations of authority. But the fact that the Special Prosecutor was an appointee of the Attorney General, as well as the existence of an administrative regulation restricting the Attorney General's power to discharge the Special Prosecutor, made it possible to dispose of the case without considering the more difficult questions concerning the President's power of removal.

Despite the court's conclusion that the Special Prosecutor was an appointee of the Attorney General, the discharge was clearly a case of presidential removal. The Acting Attorney General fired Cox after he was ordered to do so by the President, and after the Attorney General had resigned and the Deputy Attorney General had been fired rather than carry out the President's instructions. In the *Myers* case, the postmaster was technically dismissed by the Postmaster General, acting on orders of the President, but the Supreme Court treated the case exclusively as one of presidential removal.

In a statement released after he fired the Special Prosecutor, Acting Attorney General Bork argued that the President has the power to discharge “any member of the Executive Branch he chooses.”⁹⁹ There is scant judicial authority to support that proposition.¹⁰⁰ Instead, the cases almost unanimously hold that the power of removal is incident to the power of appointment,¹⁰¹ implying that the appointing officer—in this case the Attorney General—has the power of removal, and not the President. Although the rules enunciated in the *Service* and *Vitarelli* cases have apparently never been applied to a presidential removal, there is no logical reason to conclude that while the Attorney General and his successors are bound by departmental regulations, the President is

⁹⁸ 366 F. Supp. at 108.

⁹⁹ *Hearings before the Senate Committee on the Judiciary on the Special Prosecutor*, 93d Congress, 1st Sess., pt. 1, at 157 (1973).

¹⁰⁰ See, e.g., *Haynes v. Thomas*, 232 F.2d 688, 692 (D.C. Cir., 1956): “In the exercise of his power to employ and discharge executive personnel, which is absolute unless limited by statute, the President can . . .”

¹⁰¹ See, e.g., *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896, *rehearing denied*, 368 U.S. 869 (1961); *Myers v. United States*, 272 U.S. 52, 119 (1926); *Bailey v. Richardson*, 182 F.2d 46, 58 (D.C. Cir., 1950), *aff'd*, 341 U.S. 918 (1951).

not. Therefore, the fact that the removal in the instant case was instigated by the President, and not the Attorney General, should not legitimize the Special Prosecutor's dismissal. Nor should the fact that the President initiated the removal preclude judicial review of the action, or even injunctive relief, where appropriate, ordering the Attorney General to reinstate the discharged Special Prosecutor.¹⁰²

A more difficult question not reached in *Nader v. Bork* is whether a Special Prosecutor—if appointed by the President¹⁰³—is an executive officer, removable by the President under the *Myers* decision regardless of administrative regulations, or a quasi-judicial or quasi-legislative officer protected by the rule of *Humphrey's Executor*. Stressing the Special Prosecutor's need for independence, Archibald Cox himself argued that the *Myers* case did not cover a Special Prosecutor, since his position was "sufficiently like that of a member of an administrative agency like the NLRB or FCC that Congress could restrict the power of appointment."¹⁰⁴ This position would probably be difficult to sustain. Regardless of his need for independence, the Special Prosecutor, unlike members of the regulatory agencies, was not engaged in quasi-judicial or quasi-legislative activity. Prosecution is clearly an executive function, for which the Attorney General, and ultimately the President, retain responsibility.¹⁰⁵ Furthermore, the prosecutorial function is almost clearly included in the mandate of article II of the Constitution, that the President shall "take Care that the Laws be faithfully executed." As long as an official, such as a Special Prosecutor, is performing an executive function in the executive branch, it is difficult to escape the reaches of the *Myers* decision, although the failure of the Supreme Court to articulate a clear-cut test for determining whether an officer is "purely executive" or "quasi-judicial or quasi-legislative" makes it impossible to say with certainty that a Special Prosecutor belongs in one category or the other.

IV. PROPOSALS TO INSURE THE SPECIAL PROSECUTOR'S INDEPENDENCE

The dismissal of the Special Prosecutor has led to a number of proposals designed to guarantee the independence of future Special Prosecutors and to prevent their dismissal by officials in the executive branch

¹⁰² Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁰³ Although Archibald Cox was not appointed by the President, the question could arise in the future should Congress grant the President the power to appoint a new Special Prosecutor. E.g., S.2616, 93d Congress, 1st Sess. (1973), would have given the President that power.

¹⁰⁴ *Hearings before the Senate Committee on the Judiciary on the Special Prosecutor*, 93d Congress, 1st Sess., pt. 1, at 69-70 (1973).

¹⁰⁵ 28 U.S.C. §§ 503, 510 (1970).

of government. One group of proposals would transfer the power to appoint a Special Prosecutor to officials outside the executive branch. It is highly doubtful that Congress has the power to appoint a Special Prosecutor.¹⁰⁶ A more difficult question is whether the federal courts could be empowered to appoint such a prosecutor.¹⁰⁷ Although a "wealth of common law and statutory authority"¹⁰⁸ permits state courts to appoint special prosecutors where the prosecuting attorney has an interest in the case, such a procedure is "apparently unprecedented in the federal courts."¹⁰⁹ A federal statute¹¹⁰ permits the district courts to temporarily appoint U.S. Attorneys when vacancies occur, but the appointments continue only until the vacancies are filled.

Article II, § 2 of the Constitution provides: "[T]he Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." In *Ex parte Siebold*,¹¹¹ the Supreme Court sustained the constitutionality of a federal statute providing for the appointment of election supervisors by the circuit courts of the United States. Despite an earlier statement that "the appointing power . . . was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged,"¹¹² the *Siebold* Court stated that "there is no absolute requirement to this effect in the Constitution."¹¹³ Finding no "incongruity" between the courts' judicial duties and their duties to appoint inferior officers, the Supreme Court upheld the statute.

In *Hobson v. Hansen*,¹¹⁴ a three judge panel upheld the constitutionality of an act of Congress providing for the appointment of District of Columbia School Board members by the district court. The court noted

¹⁰⁶ See *U.S. v. Ferreira*, 45 U.S. (13 How.) 40, 51 (1851); *Washington v. Clark*, 84 F. Supp. 964, 966 (D.D.C. 1949), *aff'd sub. nom.* *Washington v. McGrath*, 183 F.2d 375 (1950), *aff'd*, 341 U.S. 923 (1951) ("The Congress has no authority . . . to appoint persons to the Executive branch of the Government . . . That would be an unconstitutional limitation on the President's power of appointment, which is untrammelled under Article II of the Constitution.") (Opinion of Holtzoff, J.); cf. *Springer v. The Philippine Islands*, 277 U.S. 189, 202 (1928).

¹⁰⁷ S. 2611, 93d Congress, 1st Sess (1973), would have vested the appointment of a special prosecutor in the chief judge of the U.S. District Court for the District of Columbia.

¹⁰⁸ Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 AM. CRIM. L. REV. 577 (1973).

¹⁰⁹ *Id.*

¹¹⁰ 28 U.S.C. § 546 (1970). The validity of that statute was upheld in *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

¹¹¹ 100 U.S. 371 (1880).

¹¹² *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 257-58 (1839).

¹¹³ 100 U.S. at 397.

¹¹⁴ 265 F. Supp. 902 (D.D.C. 1967).

that if an individual litigant felt that a particular judge had a personal bias or prejudice resulting from an exercise of the appointment power, the litigant could have the judge disqualified by filing a "sufficient affidavit."¹¹⁵

But those cases may not entirely dispose of the constitutional objections to a court-appointed Special Prosecutor. Article II, § 1 provides that "the executive Power shall be vested in [the] President," and article II, § 3 states that "he shall take Care that the Laws be faithfully executed." Vesting the appointment of a Special Prosecutor in the federal courts would restrict the President's control over the executive branch in the enforcement of criminal statutes, an area traditionally considered to be an executive function.¹¹⁶ That factor might well render the proposal unconstitutional.¹¹⁷

Even if the courts could constitutionally appoint a Special Prosecutor, there are other, non-constitutional objections which would undoubtedly be raised. In *Nader v. Bork*¹¹⁸ Judge Gesell noted:

The suggestion that the Judiciary be given responsibility for the appointment and supervision of a new Watergate Special Prosecutor . . . is most unfortunate. . . . The Courts must remain neutral. Their duties are not prosecutorial.¹¹⁹

The problems inherent in vesting the appointment of a new Special Prosecutor in the federal courts suggest that other remedies may be necessary. Some people have advocated the creation of an independent agency to police the executive branch. Washington lawyer Lloyd Cutler has suggested the possibility of what *Time* magazine calls the "Office of the Public Prosecutor General."¹²⁰ According to the plan, the "P.P.G." would be appointed by the President and confirmed by the Senate for a term of fifteen years. His job would be to investigate and prosecute "charges involving official misconduct and campaign law violations by the Administration." The P.P.G. could be dismissed only for a "gross breach of duty," or for the commission of a crime.

Others would go even farther. Frank Hogan, late District Attorney of Manhattan, advocated completely removing the Attorney General's

¹¹⁵ *Id.* at 916.

¹¹⁶ See *Myers v. United States*, 272 U.S. 52, 163-164 (1926).

¹¹⁷ But see *Quinn v. United States*, 349 U.S. 155, 161 (1955) ("[T]he powers of law enforcement . . . are assigned under our Constitution to the Executive and the Judiciary."), *Interstate Commerce Comm'n v. Chatsworth Cooperative Marketing Ass'n.*, 347 F.2d 821, 822 (7th Cir. 1965) ("[T]he powers of law enforcement are not wholly assigned to the executive department.").

¹¹⁸ 366 F. Supp. 104 (D.D.C. 1973).

¹¹⁹ *Id.* at 109.

¹²⁰ *TIME*, December 3, 1973, at 73.

power to prosecute, and placing it in the office of a Prosecutor General, which would be—ideally, at least—above politics.¹²¹ The Attorney General would remain, but only as legal counsel to the government. Hogan argued that it is difficult for even the “best person” to be both the lawyer for the administration and an independent decision maker, and that complete independence of the prosecutor from the influence of partisan politics is essential to the proper administration of justice.

V. CONCLUSION

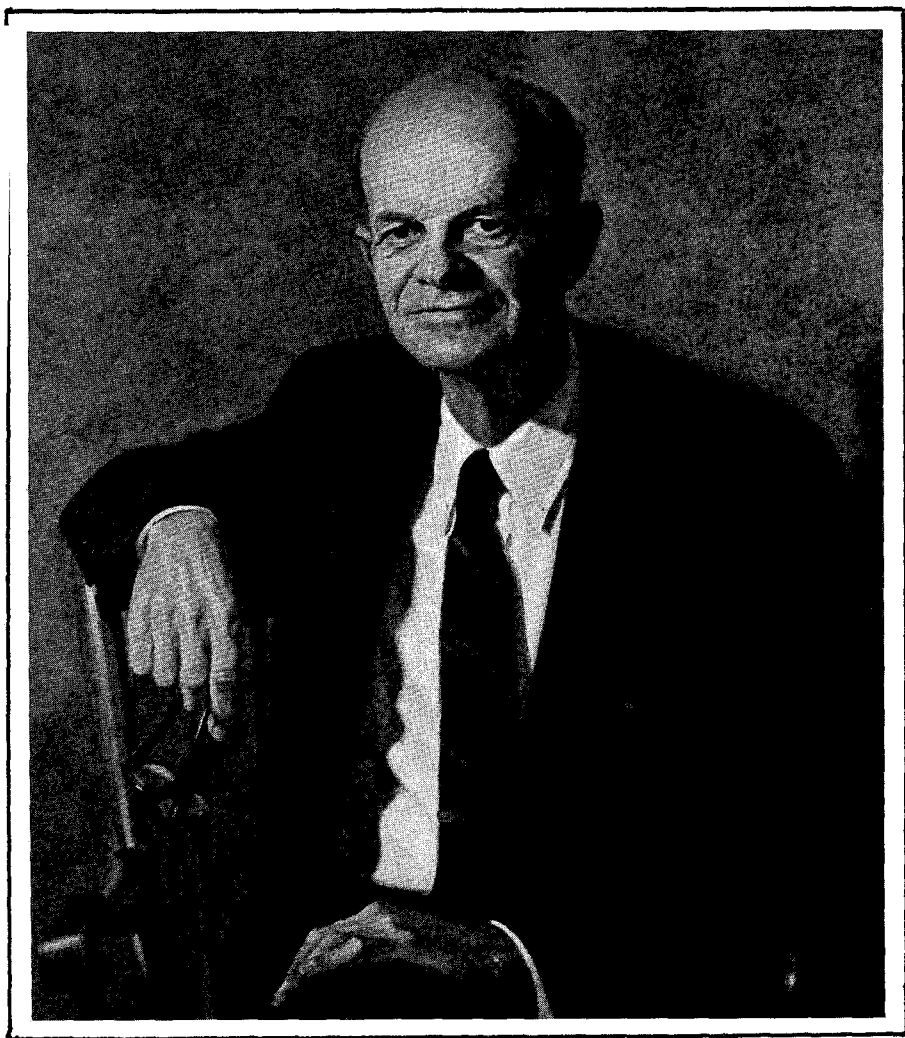
It is probably unrealistic to expect the executive branch to police itself and to ferret out improper conduct, or even criminal activity, within its own ranks. The dismissal of the Special Prosecutor strongly suggests the need for the creation of an independent agency to perform that function. That approach is clearly not without problems. The agency might easily become overzealous in an effort to justify its existence. A constitutional amendment might be required to re-allocate a portion of the President's duties to execute the laws faithfully. Nonetheless, that approach seems preferable to restricting the President's power to remove executive officers. The President's need for the removal power is critical; in the last resort, his control over the executive branch depends upon it.¹²² It is therefore essential to devise some effective method of policing the executive branch, without unduly interfering with the President's ability to carry out the duties vested in him by the Constitution.

*Kenneth W. Christman**

¹²¹ N.Y. Times, May 17, 1973, at 49, col. 7.

¹²² B. SCHWARTZ, CONSTITUTIONAL LAW 142 (1972).

* June 1974 graduate, The Ohio State University College of Law. This article was originally prepared for the Constitutional Problems Seminar conducted by Professor Keith Rosenn at the College of Law.



CHARLES C. CALLAHAN

MARCH 23, 1910—JUNE 18, 1973

